VENDOR'S IMPLIED LIEN IN EQUITY.—To the conflicting treatment of the implied equitable lien of a vendor who has made an absolute conveyance, three causes have primarily contributed: (1) the divergency of opinion with regard to its origin and nature, (2) the failure to discriminate between such a lien and the so-called vendor's lien before conveyance, and (3) the attitude of the courts, friendly or hostile, toward it. The vendor's lien before conveyance, Lord Eldon thought, was derived from the civil law, and had its basis "in this, that a person having gotten the estate of another, shall not, as between them, keep it, and not pay the consideration."[1] The Civil Law lien, however, is said to have applied only to chattels, whereas the chancery lien is allowed only to the vendor of real property.[2] The equitable principle invoked would seem as applicable to the sale of goods as to the conveyance of real property. The view that the lien was based on the maxim "equity regards as done that which ought to be done"[3] would seem to meet with the same objection. The vendor's lien does not rest on the intention of the parties, because allowed where obviously not in accord therewith.[4] The true explanation would seem to be historical. When the lien was first granted, land was immune from legal process because of its peculiar importance in the feudal system. The lien was probably a device of chancery to give relief to vendors for the satisfaction of whose claims the vendee's chattels might prove insufficient.[5] This explanation would also account for its restriction to real property. In its nature, it has been considered a constructive trust, the vendee taking title subject to a trust in favor of the vendor to the extent of the unpaid purchase money.[6] It has also been regarded as in the nature of an equitable mortgage;[7] but the general and, it is believed, the sound view is that it is not an estate in, nor a specific lien on the land, but a mere right, in certain circumstances, to have a lien declared and enforced.[8]

With these differences in mind, much of the discrepancy in the cases may be explained, though, in many decisions, no particular theory of the lien is followed, and the attitude of the court sometimes determines. If the lien is merely an additional remedy, being incident to the purchase money debt, it ceases to be available when the Statute of Limitations has barred the debt;[9] if in the nature of a mortgage or trust, a different result should be reached.[10] If the historical explanation of its origin and the cumulative remedy theory of its nature are sound, it would seem that the lien should be granted only when there is no adequate remedy at law;[11] but the majority of courts, either because of different views, or without any theoretical examination, allow the vendor to come into equity without first exhausting

[1]Mackreth *v.* Symmons (1808) 15 Ves. 329; see also 2 Story, Eq. (13th Ed.) § 1221.
[2]Ahrend *v.* Odiorne (1875) 118 Mass. 261.
[3]Ashburner, Eq. 340.
[4]Kauffelt *v.* Bower (Pa. 1846) 7 S. & R. 64, 78.
[5]Ahrend *v.* Odiorne, *supra;* Pomeroy, Eq. Jur. § 1250.
[6]Acton *v.* Waddington (1889) 46 N. J. Eq. 16, 20.
[7]High *v.* Batte (Tenn. 1836) 10 Yerg. 186.
[8]Gilman *v.* Brown (1817) 1 Mason 191, 221; Green *v.* Demoss (Tenn. 1849) 10 Humph. 371, 374; Berger *v.* Berger (1899) 104 Wis. 282.
[9]Borst *v.* Corey (1857) 15 N. Y. 505, 508; Wadell *v.* Camlock (1883) 41 Ark. 523.
[10]Relfe *v.* Relfe (1850) 34 Ala. 500.
[11]Martin *v.* Cauble (1880) 72 Ind. 67, 75; Ford *v.* Smith (D. C. 1874) 1 MacArthur, 592, 597.

his legal remedies.[12] In jurisdictions adhering to the mortgage conception, the lien may logically pass to the transferee of the note for the purchase money. In other jurisdictions it may not, and so the weight of authority holds.[13] If by the terms of the transfer the vendor be liable in case of the vendee's default, the lien will revive in his favor in case of such default. If the vendor be not liable he is considered to have received payment and the lien is not given to the transferee of the note, because *he* has not parted with the land. This last reasoning, referable both to the historical explanation of the origin of the lien, and to Lord Eldon's view, might well apply to bar a third person to whom, by the contract, the purchase money was to be paid. The cases take opposing positions.[14] In this connection, it may be noted that, other elements being present, subrogation to the vendor's lien should be allowed[15] irrespective of its nature or assignability. The objection that one cannot be subrogated to a claim which is not assignable[16] appears to be a narrow limitation upon the doctrine of subrogation.[17]

Because of the common element of security for purchase money, both the equitable protection after conveyance and the retention of title by the vendor have been termed vendor's liens, and have been similarly treated.[18] The latter, however, is not a case of lien, but of title,[19] in its last analysis, merely a defense to specific performance. Nevertheless, it is usually considered more than this, *i. e.*, as in the nature of a mortgage—as if the land were conveyed and reconveyed by way of security—hence, assignable.[20] It may be that this conception led to the erroneous mortgage view of the vendor's lien properly so called. Certain it is that the continued association of the two, illustrated in a recent Iowa case, *State Bank* v. *Brown* (Ia. 1909) 119 N. W. 81, will perpetuate unsound rules, such as the assignability of the true vendor's lien.

The divergency of opinion concerning the propriety of the vendor's lien finds ready illustration in the varying extent of evidence required to show an intention to waive the lien.[21] Several states do not recognize the lien at all.[22] In others it has been abolished by statute.[23] The Federal courts recognize it in cases arising in states which allow it;[24] but criticize it,[25] and consider it dangerous.[26] It is regarded as governed by no general

[12]Owen *v.* Moore (1848) 14 Ala. 640, 647; Bradley *v.* Bosby (N. Y. 1845) 1 Barb. Ch. 125, 183; Pratt *v.* Clark (1874) 57 Mo. 189, 192.

[13]Baum *v.* Grigsby (1862) 21 Cal. 172; Green *v.* Demoss, *supra;* Hammond *v.* Peyton (1886) 34 Minn. 529, 531, on the ground that the lien should be restricted; *contra,* Johnson *v.* Gwathweiz (Ky. 1823) 4 Littell 317; Sloan *v.* Campbell (1880) 71 Mo. 387, on the ground that the lien is an incident of the debt.

[14]Cf. Nichols *v.* Glover (1872) 41 Ind. 24, 33; Bray *v.* Brooker (1897) 6 N. D. 226.

[15]Tompkins *v.* Mitchell (Va. 1824) 2 Rand. 428; Ballew *v.* Roler (1890) 124 Ind. 557.

[16]Martin *v.* Martin (1897) 164 Ill. 640.

[17]See Moore *v.* St. Louis etc. R. R. Co. (1905) 117 Mo. App. 384, 392.

[18]Blair & Co. *v.* Marsh (1859) 8 Ia. 144, 146; Bills *v.* Mason (1876) 42 Ia. 329, 333; Roper *v.* McCook (1845) 7 Ala. 318, 322.

[19]2 Jones, Liens (2nd Ed.) § 1107.

[20]Graham *v.* McCampbell (Tenn. 1838) Meigs 52; McClintie *v.* Wise's Adm'rs. (Va. 1874) 25 Gratt. 448, 453.

[21]Cf. Avery *v.* Clark (1891) 87 Cal. 619, 623; Boos *v.* Ewing (1848) 17 Oh. St. 500.

[22]Kauffelt *v.* Brown, *supra;* Ahrend *v.* Odiorne, *supra;* Philbrook *v.* Delano (1849) 29 Me. 410, 414; Frame *v.* Sliter (1896) 29 Ore. 121, 124.

[23]Broach *v.* Smith (1885) 75 Ga. 158, 164; Lough *v.* Michael (1893) 37 W. Va. 679.

[24]Gold Mines *v.* Seymour (1894) 153 U. S. 509, 516.

[25]Bayley *v.* Greenleaf (1822) 7 Wheat. 46, 50.

[26]Rice *v.* Rice (1888) 36 Fed 858.

rules,[27] but subject to the equities of the particular case, an anomaly of courts of equity. It is thought by some courts unnecessary for the protection of a vendor who can now secure an attachment of the land, and who can amply protect himself by a mortgage or an express lien in the deed, or by retaining title until payment of the consideration.[28] It is criticised, also, as unfitted for our conditions, which require that real estate shall be freely alienable and free from all liens and encumbrances save those which are recorded.[29] The present tendency is to restrict the lien to the narrowest limits.[30]

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[27]Fiske *v.* Potter (N. Y. 1865) 2 Keyes 64, 68.
[28]Hammond *v.* Peyton, *supra.*
[29]Simpson *v.* Mundy & Brown (1865) 3 Kan. 172, 182; Smith *v.* Allen (1897) 18 Wash. 1.
[30]See Maroney *v.* Boyle (1894) 141 N. Y. 462, 468, and cases cited in last two notes, *supra.*